

ISSUE DATE: February 23, 1998

DOCKET NO. P-5564/NA-97-1390

ORDER GRANTING AUTHORITY TO PROVIDE LOCAL NICHE SERVICE SUBJECT TO
CONDITIONS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendrayner
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Moorhead Public Service's
Application for Authority to Provide Local
Niche Service

ISSUE DATE: February 23, 1998

DOCKET NO. P-5564/NA-97-1390

ORDER GRANTING AUTHORITY TO
PROVIDE LOCAL NICHE SERVICE
SUBJECT TO CONDITIONS

PROCEDURAL HISTORY

On September 15, 1997, Moorhead Public Service (MPS) submitted an application for authority to provide local niche service within the territorial limits of the City of Moorhead.

On October 29, 1997, the Minnesota Department of Public Service (the Department) submitted comments to the Commission recommending approval of MPS' application under the condition that MPS also seek and receive Commission approval of its tariff.

On October 31, 1997, in response to a request from Commission Counsel, MPS filed a letter explaining why Minn. Stat. § 237.19 does not apply to MPS' application to provide local niche service.

On November 18, 1997, MPS submitted comments in reply to the comments of the Department. In its reply, MPS argued that it should not be required to receive Commission approval of a tariff because under Minn. Stat. §237.075, subd. 9, as a municipal telecommunications provider, it is not subject to rate regulation. MPS also argued that it should not be required to file a tariff because, as a political subdivision, all of its contracts are public documents. MPS also requested that the Commission classify the local niche services that MPS proposes to provide as subject to effective competition.

On November 19, 1997, the Minnesota Cable Communications Association (MCCA) filed reply comments recommending that the Commission deny MPS' petition for authority to provide local niche service.

On November 21, 1997, the Commission issued a notice of responsive comment period to enable parties to respond to the comments of the MCCA and to MPS' request that the local niche services it proposes to provide be classified as effectively competitive.

On November 26, 1997, MPS submitted a letter to the Commission withdrawing its request to have the local niche services it proposes to provide classified as effectively competitive. MPS stated that it reserved its right to file such a reclassification request in the future and that its withdrawal does not affect other arguments regarding the reasonableness of requiring it to file a tariff.

On December 8, 1997, the Department, MPS, and US WEST Communications, Inc. (USWC) all submitted responsive comments.

The Commission met on February 3, 1998 to consider this matter.

FINDINGS AND CONCLUSIONS

I. ANALYSIS OF MPS' APPLICATION

MPS applied for a certificate of authority to provide local niche service. Several concerns were raised in the course of this docket. These concerns are addressed as follows:

A. Applicability of Minn. Stat. § 237.19

Minn. Stat. § 237.19 addresses municipal telecommunications services. It provides that any municipality, before it can construct or purchase a “telephone exchange” where an exchange already exists, must be authorized by at least 65 percent of those voting upon the proposition in a general or special election.

MPS argued that Minn. Stat. § 237.19 applied to owning and operating a “telephone exchange” but did not apply to what MPS sought, i.e. authority to own and operate “telephone lines.” In asserting that a “telephone exchange” is subject to the 65 percent vote requirement of Minn. Stat. § 237.19 while a “telephone line” is not subject to that requirement, MPS noted that Chapter 237 distinguishes between the terms “telephone exchange” (Minn. Stat. § 237.01, subd. 2) and “telephone line” (Minn. Stat. § 237.16, subd. 1). MPS argued that the statute’s use of the term “telephone exchange” and silence regarding “telephone lines” indicated the legislature’s intent to impose the 65 percent vote requirement regarding municipal ownership or operation of a “telephone exchange” and not on municipal ownership/operation of “telephone lines.” To further distance itself from operation of a “telephone exchange”, MPS also noted that Commission rules define an “exchange area” as a unit having one or more central offices or wire centers. MPS argued that since it does not propose to operate a central office or wire center, its operation clearly did not amount to operation of a “telephone exchange”.

The Commission accepts the distinction between “telephone exchange” and “telephone line” and notes that the plain meaning of Minn. Stat. § 237.19 is that it applies to municipal ownership of a “telephone exchange”. Since MPS is simply seeking authority to own and operate “telephone lines” and does not seek authority to offer switched service using a central office or switched service to the general public, it need not meet the 65 percent vote requirement of Minn. Stat. § 237.19.

B. Applicability of Minn. Stat. § 237.07

Minn. Stat. § 237.07, subd. 1 requires all telephone companies, among other things, to file a tariff stating its specific rate, toll, or charge for every kind of noncompetitive service, together with all rules and classifications used by it in the conduct of its telecommunications business.

MPS asserted that it was not required to file tariffs under requirement of Minn. Stat. § 237.07 because as a municipal telecommunications provider it is exempt from regulation. Moreover, MPS argued there is no public interest reason to file tariffs with the Commission because, as a political subdivision all data created by it are available to the public, including all service contracts.

The Department agreed that MPS was not a telephone company for purposes of rate regulation but argued that MPS is a telephone company as defined in Minn. Stat. § 237.01, subd. 2 and is, therefore, subject to the tariffing requirement of Minn. Stat. § 237.07, subd. 1. The Department also argued that such a requirement served the public interest because It would be difficult for most customers to determine what services are available, and at what prices, if their only source of information is a file of contracts. Also, the Department noted, a tariff or price list would provide customers with basic information to determine if services offered by MPS are comparable to services offered by other entities. The Department stated that in order for markets to function, customers must have basic information about the services available.

USWC argued that MPS should be subjected to regulatory parity with other telecommunications providers and should not be allowed to circumvent the tariff and price list filing requirements of Minn. Stat. § 237.07 and Minn. Rule, Part 7812.0300 (H). USWC agreed with the Department that the Commission should condition its approval of authority to offer local niche services on MPS filing and maintaining a price list with the Commission.

The Commission finds that despite its status as a municipality MPS is subject to Minn. Stat. § 237.07 and, hence, is required to receive Commission approval for and keep on file current **price lists** for the services it seeks to provide in its application.¹ MPS is subject to all the regulations under Minnesota Statutes and Commission rules that apply to companies certified to provide local niche service. A municipality's exemption from *rate* regulation does not extend to other regulatory requirements.

C. Local Niche Service

MCCA questioned whether the services MPS proposed to offer are simply local niche services. The MCCA argued that MPS' description of the Internet service it proposed to offer calls into question whether this service is local niche service or if it goes beyond the scope of local niche service. Also, MCCA stated that although MPS' petition indicated that it only sought authority to offer point-to-point connections between end-user locations, its announced plan to lease dark fiber and the sale or lease of bandwidth seems to be something over and above the simple provision of "point-to-point connections between end-users locations" and to not fit the definition of local niche service.

¹ Under the statute, a telephone company is required to file a **price list** for each service it provides that is subject to *emerging competition* and a **tariff** for each *noncompetitive* service it provides. Since the services MPS seeks to provide are subject to emerging competition, MPS will be required to file a price list for each service provided.

MCCA stated that if MPS sought to provide more than local niche service, it should clarify and amend its application to reflect what it intends to provide. MCCA also stated that if MPS' requested certificate is granted, it should be clarified that it must seek further approval from the Commission before expanding its offerings beyond local niche service.

MPS responded that the local niche service category is a catch-all provision designed to avoid the kind of confusion that the MCCA is creating in its comments. MPS stated that services are classified as local niche services if they fall within one of three categories:

- 1) point-to-point connections between enduser locations within a service area;
- 2) telecommunications services that do not fall within the definition of local service; and
- 3) telecommunications services that do not fall within the definition of interexchange service.

MPS asserted that the services it proposes to offer fall squarely within the definition of local niche service because it is only proposing to offer "point-to-point connections between enduser locations within its service area."

The Department noted that the Commission has already granted local niche service authority to providers who propose to offer some of the same services as those proposed by Moorhead Public Service. For example, the Department noted, Norlight was given local niche authority and one of the services it proposed was to provide dedicated access lines from its customers' premises to its points of presence in Minneapolis and other cities. Docket No. P-5041/NA-97-1194. Range Television also received a certificate to provide private and dedicated line service where it was understood that the authority included provision of Internet services. Docket No. P-5451/NA-96-1583.

The Commission notes that Minn. Rules, Part 7812.0100, subp. 31 defines "local niche service" as follows:

"Local niche service" refers to point-to-point connections between end-user locations within a service area and any telecommunications services under the commission's jurisdiction that do not fall within the definition of local service or the definition of interexchange service.

The Commission finds that the services MPS seeks authority to provide are properly classified as local niche services. The primary activities proposed by MPS are point to point connections between call originators and call receivers along MPS' line, hence clearly within MPS' service area, connections that are achieved without use of dial tone and access to the switched access network. MPS' other potential activities, lease of dark fiber and sale of bandwidth, are also properly conceptualized as point-to-point connections between end-user locations within MPS' service area. As such, all these activities are directly listed within the definition of local niche services: "... point-to-point connections between end-user locations within a service area...."

D. Ratepayer Protection From Risk

MCCA argued that MPS wants to enter new territory on the backs of its captive utility ratepayers. If MPS is not successful, MCAA stated, the captive utility ratepayers will pay through higher prices for water and electricity. MCCA stated that there is a real possibility that MPS will not be successful in the telecommunications business because its experience has been in monopoly markets. If private entrepreneurial dollars were at risk, MCCA asserted, this concern might not rise to the public interest level; however, when captive ratepayers' dollars are at risk, it does. MCCA also noted that Cablecom, the current cable franchise cable system for Moorhead, has announced plans to build within the next year a fiber optic system that is capable of providing all the services proposed here without putting captive ratepayers' dollars at risk.

MPS denied that its water and electric customers were at substantial risk. MPS acknowledged that entry into the telecommunications business required some capital investment, but minimized that investment in comparison with the value of its current 21 mile fiber optic network which it has been underutilizing to date. Furthermore, MPS stated, risk will be minimized since it will not provide any local niche service without a contract ensuring the recovery of the cost of providing the service and all revenue derived from telecommunications services will be either reinvested in utility services or increase the City transfer. MPS predicted that in the long run, ratepayers will benefit from the increased efficiency that will result from the modest capital expenditures required to enter the telecommunications business. MPS also noted that taxpayers may also benefit from an increase in the City transfer.

USWC recommended that the Commission consider whether granting the petition is consistent with the public interest and whether the city's taxpayers and MPS ratepayers would be unduly exposed to financial risk. USWC asserted that by only providing local niche services, the city is sidestepping the requirements of Minn. Stat. § 237.19. USWC objected that the voters in Moorhead will not be given the opportunity to vote on MPS' proposal to offer local niche services. USWC recommended that if Moorhead Public Service's application is approved, the Commission should impose conditions that will protect the citizens of Moorhead.

The Commission believes that given 1) the limits placed on MPS activity by Minn. Stat. § 237.19, 2) the Moorhead City Council resolution authorizing limited telecommunications operation, 3) the requirement of separate accounting imposed on MPS by Minn. Stat. § 412.371 (discussed below), 4) the relatively small amount of additional capital investment required in this case, and 5) the fact that MPS is ultimately responsive to the voters (ratepayers) of Moorhead, the MPS' ratepayers are reasonably protected under MPS' plans.

E. Cross-Subsidization

USWC stated that the Commission should prevent Moorhead Public Service from using, directly or indirectly, its revenues and profits from its monopoly water and electricity utility services to subsidize its private line business. To avoid this subsidization entanglement, USWC argued that the City of Moorhead and MPS should be required to maintain separate financial accounts and records for all operations related to the provision of local niche services. Further, according to USWC, all financing for telecommunications operations should come from independent private funding or public bond financing.

The Commission notes that Minn. Stat. § 412.371 requires each public utility to maintain a separate fund or account. In the instance of MPS, these financial documents will be government data, available to the public under the Minnesota Government Data Practices Act. In addition, to underline the importance of avoiding cross-subsidization, which the Commission would view as an unfair and anti-competitive activity, the Commission will exercise its authority under Minn. Stat. § 237.16, subd. 1 (a) and establish as a term and condition MPS' authority that it not use, directly or indirectly, its revenues and profits from its monopoly water and electric utility services to subsidize its private line business. These safeguards, together with anticipated monitoring by the Department and vigilance on the part of interested parties (ratepayers, taxpayers and competitors) appears sufficient at this point to address the concern.

F. Regulatory Bias

USWC recommended that the Commission ensure that the City of Moorhead does not provide preferential treatment to MPS or unfairly discriminate against other telecommunications providers. USWC stated that the City of Moorhead clearly has a vested interest in the success of MPS and has authority 1) to control certain aspects of telecommunications in the city, such as managing the rights-of-way and 2) to impose management cost fees on telecommunications providers. USWC stated that the City should not be allowed to provide preferential treatment to MPS or to discriminate against other telecommunications providers.

MCCA also noted what it termed the real possibility of regulatory bias, noting that if MPS is granted a certificate of authority, separate arms of the same municipality will be both regulator and competitor.

MPS responded that the fear of regulatory bias is unfounded and not supported by any evidence. MPS noted that Minn. Stat. § 237.163, subd. 6(c) already states that the “rights, duties, and obligations regarding the public right-of-way imposed under this section must be applied to all users of public rights-of-way, *including the local government unit...*”. i.e. to MPS. (Emphasis added.) MPS stated that the city will comply with Minn. Stat. § 237.163. If a provider has a complaint, the proper complaint procedure is provided in Minn. Stat. § 237.163, subd. 5.

The Commission does not believe that USWC and MCCA's concerns about potential regulatory bias on the part of the City of Moorhead provide a basis for denying the certificate of authority to MPS, nor does the Commission find that this concerns warrants imposition of special conditions to assure regulatory parity. Minn. Stat. § 237.163 should help ensure parity between public and private providers of telecommunications services. Under Minn. Stat. § 237.163, there are numerous references to the requirement that local units of government, in their management of the public rights-of-way, cannot unlawfully discriminate against any user or grant a preference to any user. The Commission does not believe anything further need be stated to the City of Moorhead and will assume statutory compliance until a complainant, using the complaint procedure set forth in Minn. Stat. § 237.163, subd. 5, shows otherwise.

G. Adequacy of Financial, Technical, and Financial Qualifications

MCCA asserted that MPS lacked the financial, technical, and managerial qualifications to provide local niche service, particularly since MPS was unaccustomed to providing service on a competitive basis.

The Department stated that it had reviewed the issue and found no reason to oppose the application based on the financial statements and added that MPS staff are familiar with the operation of telephone systems and appear to have the necessary technical expertise to offer the proposed services. The Department recommended that the Commission approve MPS' application request to provide local niche services with one condition: that MPS provide, and the Commission approve, a tariff.

For its part, MPS filed reply comments refuting MCCA's concerns regarding financial, technical, and managerial qualifications.

Having reviewed this issue, the Commission agrees with the Department and finds that the record in this matter supports a finding that MPS has the financial, technical, and managerial resources to provide the telecommunications services it requests authority to provide.

H. Independent Case Based Rates

The Department recommended that if MPS proposed in its tariff to offer all services under individually case-based pricing (ICB.), then the Commission should require MPS to file the contracts with the Department with sufficient cost information for the Department to determine that prices are not unreasonably discriminatory.

The Commission notes that MPS is subject to all regulatory obligations affecting providers of local niche service. As such, if it offers ICB priced services, MPS will be required to submit its individual contracts with cost support to document that the ICB rates cover costs.

II. COMMISSION ACTION

Based on the foregoing analysis, the Commission will grant MPS a certificate of authority to provide local niche service, subject to all regulations under Minnesota Statutes and Commission rules that apply to all companies certified to provide local niche service. There are no exemptions from regulation for telecommunications service providers that are municipally owned. Consequently, MPS' certificate is issued with the condition that MPS file a tariff or price list with the Commission. Finally, if any service offered by MPS are ICB priced, the contracts for that service, along with supporting cost information, should be filed with the Commission.

ORDER

1. The request of Moorhead Public Service (MPS) for a certificate of authority to provide the following local niche services within the territorial limits of the City of Moorhead, is approved, as conditioned in Ordering Paragraphs 2, 3 and 4:
 - T1 data and video transport on a private line basis;
 - PBX off-premise extensions on a private line basis; and
 - transmission capacity on its fiber network for lease to wholesale and retail telecommunications service providers and cable television operators.
2. MPS certificate of authority is granted on the condition that MPS submit to the

Commission and receive Commission approval of its price list. MPS shall submit proposed price lists for these services within 15 days of this Order.

3. For any service that MPS wishes to offer on an individual case basis (ICB priced), MP must submit its individual contracts to the Department with cost support to document that the ICB rates cover cost.
4. In operating under its certificate of authority, MPS is subject to all regulations under Minnesota Statutes and Commission rules that apply to all companies certified to provide local niche service.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-4596 (voice), (612) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).